A

ULAGANATHAN MUTHIAH v. PRUDENTIAL ASSURANCE MALAYSIA BHD

HIGH COURT MALAYA, KUALA LUMPUR
ONG CHEE KWAN JC
[SUIT NO: WA-22NCC-569-12-2018]
B 6 JANUARY 2020

INSURANCE: *Contract of insurance – Policy – Non-disclosure – Deceased took life insurance policy from insurer – Claim by nominee under policy upon deceased's death rejected on ground of non-disclosure – Deceased failed to make full disclosure*
C *of monthly earnings and certain procedure and pre-operation tests he had undergone prior to taking insurance policy – Whether there was non-disclosed information or deliberate and/or reckless misrepresentation – Whether insurer would enter into insurance contract with insured deceased if insurer had known of non-disclosed information or deliberate and/or reckless misrepresentation – Whether insurer*
D *entitled to reject claim under policy – Principle of uberrimae fidei – Financial Services Act 2013, s. 129, Schedule 9, paras 5(1), 7(1)(b), (2), (4), (8), (15)*

The defendant, an insurance company, had issued a life insurance policy to one Selvakumar ('deceased') which covered, *inter alia*, death benefits. The plaintiff, the named nominee under the said policy, submitted a claim upon
E the deceased's death. However, the claim was rejected as the deceased failed to disclose in the proposal form for the policy that (i) he had a splenectomy, which meant he had a weaker immune system; (ii) the pre-operation tests *ie*, CT scans, blood test and electrocardiogram, done prior to his splenectomy; (iii) he was admitted to Hospital Melaka for five days from
F 19 to 23 March 2012; (iv) he was diagnosed with infected pancreatic pseudocyst on 20 March 2012; (v) an ultrasound was done on him on 20 March 2012; and (vi) he was a part-time security guard earning only RM1,600 per month. This prompted the plaintiff to commence the present action on the grounds that (i) the non-disclosed information or deliberate
G and/or reckless misrepresentation raised by the defendant had no bearing on the cause of death of the deceased; and (ii) there was no evidence that the deceased had undergone a splenectomy or had no spleen in his body. In support of his claim, the plaintiff referred to a post mortem report which concluded that the deceased's death was due to a heart disease and fatty liver and had nothing to do with the pancreas or the spleen.

H

Held (dismissing claim):

(1) The deceased had undergone a splenectomy prior to the execution of the proposal form. The medical officer at the Surgical Department of Hospital Melaka ('PW1') testified that he had completed a medical
I questionnaire and, based on PW1's professional opinion, given the nature of the deceased's condition and the position of the operational scar, it was most likely that the deceased had undergone a splenectomy prior to his admission. This finding immediately casted doubt on the

veracity and accuracy of the post mortem report which was in respect of a person with a spleen. Accordingly, the post mortem report was unreliable and little weight was placed on the same. (paras 31, 32 & 34)

(2) The deceased failed to disclose the splenectomy, ultrasound and diagnosis in the proposal form despite having been asked the respective clear and specific questions in the proposal form. It could hardly be said that the deceased would have no knowledge of these matters. Clearly, the deceased knew that his answers to the questions in the proposal form were untrue or misleading. He did not care whether or not they were untrue or misleading and had acted in breach of his duty of *uberrimae fidei*. His answers were relevant to the defendant for its assessment of the risks and whether to accept the risks. As the deceased's policy was a life insurance policy, if the defendant had known of the non-disclosed information or deliberate and/or reckless misrepresentation, which clearly increased the defendant's insurance risk, the defendant would either not have entered into the insurance policy or it would have done so on different terms. (paras 52, 53 & 56)

(3) Pursuant to paras. 7(1)(b), 7(2), 7(4), 7(8) and (15) of Schedule 9 of the Financial Services Act 2013, the defendant was entitled to avoid the policy and to refuse all claims under the policy by reason of the deceased's breach of his duty of *uberrimae fidei* and to reject the plaintiff's claim. (para 57)

Case(s) referred to:
Leong Kum Whay v. QBE Insurance (M) Sdn Bhd & Ors [2006] 1 CLJ 1 CA ***(refd)***

Legislation referred to:
Financial Services Act 2013, s. 129, Schedule 9 paras 5(1), 7(1)(b), (2), (4), (8), (15)

For the plaintiff - GT Vanan; M/s Zarina G T Vanan Vijaya
For the defendant - Wong Hok Mun & P S Koh; M/s Azim, Tunku Farik & Wong

Reported by Najib Tamby

JUDGMENT

Ong Chee Kwan JC:

[1] This action has to do with the principle of *uberrimae fidei* in a contract of insurance. The principle is trite. The duty has been described by the Court of Appeal in *Leong Kum Whay v. QBE Insurance (M) Sdn Bhd & Ors* [2006] 1 CLJ 1; [2006] 1 MLJ 710 as follows:

> It is settled beyond dispute that a contract of insurance is one that imposes mutual duty on the parties to it to act *uberrimae fides* towards each other. On the part of the insured, he or she must make full and frank disclosure of all material facts. It is not for him or her to decide in his or her own mind what is material … The duty is on the insured to make full disclosure of material facts within his knowledge.

[2] The duty of disclosure has been codified in Malaysia in the Financial Services Act 2013 ("FSA") which lays down the duty of disclosure for all insurance contracts. More specifically, s. 129 of the FSA, which came into operation since 1 January 2015, provides that:

> Schedule 9 sets out the pre-contractual duty of disclosure and representations for contracts of insurance in Part 2, and the remedies for misrepresentations relating to contracts of insurance in Part 3.

[3] Schedule 9 of the FSA provides:

> 5(1) Before a consumer insurance contract is entered into or varied, a licensed insurer may request a proposer who is a consumer to answer any specific questions that are relevant to the decision of the insurer whether to accept the risk or not and the rates and terms to be applied.
>
> (2) It is the duty of the consumer to take reasonable care not to make a misrepresentation to the licensed insurer when answering any questions under subparagraph (1).
>
> ...
>
> (7) A licensed insurer shall, before a consumer insurance contract is entered into, varied or renewed, clearly inform the consumer in writing of the consumer's pre-contractual duty of disclosure under this paragraph, and that this duty of disclosure shall continue until the time the contract is entered into, varied or renewed.
>
> (8) Subject to subparagraphs (1) and (3), a consumer shall take reasonable care to disclose to the licensed insurer any matter, other than that in relation to subparagraph (1) or (3), that he knows to be relevant to the decision of the insurer on whether to accept the risk or not and the rates and terms to be applied.
>
> (9) Nothing in this Schedule shall affect the duty of utmost good faith to be exercised by a consumer and licensed insurer in their dealings with each other, including the making and paying of a claim, after a contract of insurance has been entered into, varied or renewed.

[4] The main question for determination in this action is whether the duty of *uberrimae fidei* in a life policy should be confined only to information that is directly or indirectly related to the cause of death.

Background Facts

[5] The subject matter in the present suit is a life insurance policy entitled "PRUlink million" bearing No. 35053966 issued to one Selvakumar a/l T Kanniah ('the deceased') by the defendant ("the policy").

[6] The policy was issued pursuant to the deceased's application and or proposal to the defendant for the defendant's insurance product entitled "PRUlink million" with "crisis defender" and "enhanced PRUpayor basic" as add-on benefits *vide* a life insurance regular premium proposal form

bearing No. 104130686 ("proposal form") submitted on 18 September 2015. "PRUlink million" is in essence a life insurance policy which provides coverage for, *inter alia,* death benefits.

[7] A few months after the deceased's demise on 25 November 2015, the plaintiff who was the named nominee under the policy submitted a death claim to the defendant on 5 April 2016 *vide* a death claim form dated 3 April 2016 ("death claim").

[8] The plaintiff's death claim was rejected by the defendant *vide* its letter dated 17 August 2016 on the grounds of non-disclosure.

[9] It is the plaintiff's case that the defendant was wrong to reject the death claim as the deceased's death was due to heart disease and fatty liver, which had nothing to do with the non-disclosure which relates to the pancreas. In short, the plaintiff's case is that the non-disclosure was irrelevant to the actual cause of death.

The Non-Disclosure

[10] The defendant has established through the plaintiff's witness, one Dr Lim Wei Sern ("PW1"), a medical officer in the Surgical Department of Hospital Melaka that:

(i) PW1 had treated the deceased during the deceased's admission to Hospital Melaka on 19 March 2012 wherein the deceased was diagnosed with infected pancreatic pseudocyst;

(ii) the deceased was admitted to Hospital Melaka for five days from 19 March 2012 to 23 March 2012;

(iii) on 19 March 2012 or 20 March 2012, blood inversion and ultrasound were done on the deceased;

(iv) the deceased was diagnosed with pancreas infection/infected pancreatic pseudocyst on 20 March 2012 and the deceased was informed of such diagnosis by PW1 on 20 March 2012; and

(v) Based on the result of the ultrasound conducted on 20 March 2012, the deceased had, prior to his admission to Hospital Melaka on 19 March 2012, had a splenectomy, ie, an operation to remove his spleen.

[11] According to PW1, a splenectomy is a major operation conducted under general anaesthetic and takes approximately two hours. Prior to a splenectomy, the usual pre-operation fasting and pre-operation tests, eg, CT scans, blood pressure, blood test and electrocardiogram (ECG), are required. The operation scar will take five to seven days to heal and one who had a splenectomy will only be discharged thereafter. As the surgical scar/wound after a splenectomy is relatively large/long, it will be quite painful. If one has had a splenectomy, it is not something that he will forget; and after a patient had a splenectomy, his immune system is jeopardised, he is a lot easier to fall sick later on and preventive antibiotics/vaccination will be given.

[12] The defendant also established through PW4, the plaintiff, that the deceased was at the material times working for the plaintiff as a "part time" security guard earning RM1,600 a month.

[13] It is not disputed that the defendant had clearly informed the deceased *vide* the proposal form of his pre-contractual duty of disclosure. The proposal form expressly provided as follows:

> All details required in this proposal form are relevant to our decision on whether to accept the risk, and any rates and terms to be applied. If you are entering into a consumer insurance contract, you have a duty to take reasonable care not to make any misrepresentation to us when completing this proposal form. Such duty of disclosure shall continue until the time a contract of insurance is entered into pursuant to this proposal form. You would also have to take reasonable care to disclose to us any matter which may not be covered in this proposal form that you know to be relevant to our decision on whether to accept the risk, and the rates and terms to be applied ...

[14] More specifically, in the proposal form, the defendant asked *inter alia*, the following clear and specific questions:

(i) at part 1, questions 1.13 to 1.17, the Deceased's occupation, exact duties, nature of business and annual income;

(ii) at part 3, section B, question 3.5 – "Do you currently have, or ever had in the past, any symptoms, or complaints, or investigation, or treatment, or receiving advice for:

(3.5d) jaundice, being a hepatitis B or C carrier, gastritis, stomach or duodenal ulcer or any disorder of the stomach, intestines, liver, gallbladder, pancreas or digestive system?

(3.5g) Cancer (including leukaemia, lymphoma, melanoma), tumour, growth, cyst, enlarged glands or skin infections, Systemic Lupus Erythematosus (SLE), Kawasaki disease or any other disorder of the immune system?";

(iii) at part 3, section B, question 3.6a – "Are you currently considering or receiving medical treatment or under medical care of any kind; or ever had any illness/injury or disability lasting or requiring treatment or absence from work for more than 7 days, or been advised or referred to or admitted to a hospital or medical facility or specialist?"; and

(iv) at part 3, section B, question 3.6b – "Have you ever had or been advised or intend to undergo any investigations/screening test including but not limited to angiogram, echocardiogram, electrocardiogram, X-ray, ultrasound, CT/MRI/PET scan, blood or urine test, biopsy?".

[15] In response to questions 1.13 to 1.17 of the proposal form, the deceased stated that he was a businessman in the business of electrical wiring overseeing the business management and earning RM70,000 per annum.

[16] As for the rest of the questions stated in para. 14(ii), (iii) and (iv) above, the deceased had answered in the negative in the proposal form.

[17] Based on the aforesaid, the defendant justified its repudiation of the death claim on the grounds of non-disclosure or the deceased's failure to disclose in the proposal form for the policy in issue:

(i) his prior splenectomy;

(ii) the pre-operation tests, eg, CT scans, blood test and electrocardiogram (ECG), done prior to his splenectomy;

(iii) he was admitted to Hospital Melaka for five days from 19 March 2012 to 23 March 2012;

(iv) he was diagnosed with infected pancreatic pseudocyst on 20 March 2012;

(v) ultrasound was done on him on 20 March 2012; and

(vi) he was a "part time" security guard earning RM1,600 per month only.

(collectively referred as "the non-disclosed information or deliberate and/or reckless misrepresentation").

[18] According to DW1 who is from the defendant's Technical Services, Medical Business Management Department, based on the assessment of the impact of the deceased's aforesaid operation, ultrasound and diagnosis, he formed the view that if the aforesaid operation, ultrasound and diagnosis were made known to the defendant when the deceased submitted his proposal form, the policy would not have been issued then and that the deceased's application for the policy would have been postponed for further review or additional premiums and/or exclusion clause would have been imposed.

[19] This is because the deceased's aforesaid operation, ultrasound and diagnosis would affect the defendant's insurance risk. DW1 explained that underwriting outcome would rely on the information gathered from the information obtained to determine the degree of risk, coverage amounts, premiums and whether a policy is to be issued to the proposer with any special terms.

[20] According to DW1 who is an executive in the Department of New Business and Underwriting of the defendant, if the deceased's proposal form contained the information that:

(i) the deceased had undergone a splenectomy;

(ii) the deceased had had an electrocardiogram;

(iii) the deceased was admitted to Hospital Melaka for five days from 19 March 2012 to 23 February 2012 due to infected pancreatic pseudocyst; and

(iv) the deceased's salary was RM1,600 per month or RM19,200 per annum;

the deceased's proposal form for the policy would not have been accepted. In respect of the deceased's salary, DW1 testified that the annual premium payable for a policy must not exceed 30% of the proposed insured's annual income.

Plaintiff's Case

[21] The plaintiff raised five legal issues in his written submission. These are:

(i) the non-disclosed information or deliberate and or reckless misrepresentation raised by the defendant have no bearing on the cause of death of the deceased which in the death certificate was stated as "undetermined";

(ii) there is no evidence that the deceased had undergone an operation for the "removal of spleen" and/or neither is there any evidence that there was no spleen in the deceased's body;

(iii) there is no evidence that the deceased had personally admitted the answers to the questions stated in the proposal form;

(iv) there is no evidence that the deceased had appointed the plaintiff to be his agent to deal with the defendant's insurance agent; and

(v) There is no evidence of a principal and agent relationship between the plaintiff and the deceased.

Each of these issues shall now be considered in turn.

[22] There is abundant evidence to show that the defendant had clearly informed the deceased of his pre-contractual duty of disclosure as required of the defendant under the law. In the proposal form, the defendant had, in accordance with para. 5(1) of Schedule 9 of the FSA, informed the deceased that all details required in the proposal form are relevant to the defendant's decision on whether to accept the risk and the rates and terms to be applied when the deceased was requested to complete and answer the questions in the proposal form.

[23] The plaintiff had referred to the post mortem report conducted by PW2 which had concluded that the deceased's death was due to heart disease and fatty liver. This, according to the plaintiff had nothing to do with the pancreas or the spleen. On this ground, the plaintiff submitted that the non-disclosed information and or reckless misrepresentation, if at all, was wholly irrelevant to the cause of death. As such, the defendant's repudiation of the death claim is wrong in law.

[24] The law as to what are considered as "relevant" disclosure is stated by the Court of Appeal in the case of *Leong Kum Whay v. QBE Insurance (M) Sdn Bhd & Ors* (*supra*) at pp. 19 to 20 (CLJ); pp. 720 to 721 (MLJ) as follows:

> Speaking of the duty imposed upon an insured, Cohen LJ in *Schoolman v. Hall* [1951] Lloyd's Rep 139 at p 143 said:
>
> > So, I think, applying those observations here, while the insurers have stipulated that the answers to the fifteen questions 'shall be the basis of the contract', that only has the effect of preventing any argument as to the materiality of those questions should dispute arise, but it does not relieve the proposer of his general obligation at common law to disclose any material which might affect the risk which was being run or which might affect the mind of the insurer as to whether or not he issue a policy.
>
> The nature of the duty to make disclosure was also considered by Lord Jauncey of Tullichettle in *Banque Financiere De La Cite SA v. Westgate Insurance Co Ltd* [1991] 2 AC 249 where he said:
>
> > The duty of disclosure arises because the facts relevant to the estimation of the risk are most likely to be within the knowledge of the insured and the insurer therefore has to rely upon him to disclose matters material to that risk. The duty extends to the insurer as well as to the insured: *Carter v. Boehm* (1766) 3 Burr 1905 [1766] 97 ER 1162]. The duty is, however, limited to facts which are material to the risk insured, that is to say, facts which would influence a prudent insurer in deciding whether to accept the risk and, if so, upon what terms and a prudent insured in entering into the contract on the term proposed by the insurer. Thus any facts which would increase the risk should be disclosed by the insured and any facts known to the insurer but not to the insured, which would reduce the risk, should be disclosed by the insurer. There is, in general, no obligation to disclose supervening facts which come to the knowledge of either party after conclusion of the contract (*Lishman v. Northern Maritime Insurance Co* (1875) LR 10 CP 179), subject always to such exceptional cases as a ship entering a war zone or an insured failing to disclose all facts relevant to a claim.

[25] Accordingly, what are determined to be relevant disclosures are that considered to be materials to a prudent insurer in deciding whether or not to accept the risks. So, the fact that the cause of death of the insured may not be related to the matters that the insurer required disclosure does not mean that the non-disclosure is immaterial.

[26] Pursuant to para. 7(8) of Schedule 9 of the FSA, unless the contrary is shown, it is to be presumed that the consumer knew that a matter about which the licensed insurer asked a clear and specific question was relevant to the insurer. Applying this presumption, it must be presumed that the information that was elicited from the questions stated in the defendant's proposal form would be information that was material and relevant to the

defendant in determining whether or not to accept the deceased for the policy applied for. The fact that the information may have no bearing on the cause of death of the deceased is not the legal test. Rather, it is whether the information is relevant for the defendant when making the decision whether to accept the deceased's proposal form.

[27] In this case, DW1's and DW2's evidence that had the non-disclosed information and deliberate and or reckless misrepresentation were made known to the defendant, the defendant would not have accepted the deceased's proposal form was not challenged at all.

[28] Accordingly, I see no merits in the plaintiff's contention that the breach of the *uberrimae fidei* obligation by the deceased was irrelevant to his death claim.

[29] The plaintiff sought to dispute the alleged non-disclosure of the splenectomy, contending that there is no direct evidence that the deceased had in fact undergone the operation. The plaintiff relied on the post mortem report which does not indicate a missing spleen in the deceased's body. As regards PW1's evidence, the plaintiff said that PW1 did not rule out the possibility that the deceased's internal echogenicity which refers to the absence of the spleen could be congenital.

[30] I respectfully disagree. PW2 who came to give evidence on the post mortem report acknowledged that she did not personally conduct the post mortem and was not the author of the post mortem report. There are two critical facts in the post mortem report that raise serious doubts to its reliability. Firstly, the report was in respect of a person with a spleen and clearly not of a person who had a splenectomy. Secondly, the report was in respect of a person who was 7cm taller and 12kg heavier than the deceased.

[31] I find that on the balance of probability, the deceased had indeed undergone splenectomy prior to the execution of the proposal form. PW1 who was a medical officer in the Surgical Department of Hospital Melaka testified that he had on 12 July 2016 completed a medical questionnaire which the plaintiff had submitted in support of the death claim. During his cross examination, PW1 confirmed that:

(i) the deceased was admitted to Hospital Melaka for five days from 19 March 2012 to 23 March 2012;

(ii) at the time of first consultation on 19 March 2012 by PW1, the deceased had complained of abdominal pain at an operation site for two days and was treated as post-operative pain;

(iii) the deceased underwent an ultrasound on 20 March 2012 and the result of the ultrasound revealed a collection 6.5 x 6.9cm with internal echogenicity;

(iv) the deceased was diagnosed with infected pancreatic pseudocyst; and

(v) PW1 had informed the deceased of the diagnosis of infected pancreatic pseudocyst on 20 March 2012.

[32] Based on PW1's professional opinion, given the nature of the deceased's condition and the position of the operational scar, it is most likely that the deceased had undergone a splenectomy prior to his admission.

[33] Whilst PW1 did concede that the internal echogenicity may be a congenital condition, he opined that it is more probable that the missing spleen was due to splenectomy given the deceased's medical evidence before him. I accept his evidence.

[34] Of course this finding immediately casts doubts on the veracity and accuracy of the post mortem report which is in respect of a person with a spleen. Accordingly, I find the post mortem report unreliable and place little weight on the same.

[35] The remaining three issues raised by the plaintiff have to do with the two different versions of the events pertaining to the execution of the proposal form and shall be dealt together.

[36] During the trial, two conflicting and contradicting versions of the events on the completion and signing of the proposal form for the policy emerged from the plaintiff's witnesses, PW3 and PW4.

[37] According to PW3 who was at the material times the defendant's insurance agent, PW3 had obtained the answers to the questions in the proposal form from the plaintiff and he did check and confirm with the plaintiff that all the answers in the proposal form were true before he gave the completed proposal form to the plaintiff for the deceased's execution. This version suggests that the deceased was not at all personally involved in answering the questions in the proposal form. What is also pertinent is that PW3 also gave evidence that he did not witness the deceased signing the proposal form at all as he had never met with the deceased.

[38] On the other hand, according to PW4, at the completion of the proposal form, the deceased, PW4 and PW3 were all present. The three parties had met at a coffee shop where the plaintiff had taken the role of translating the questions in the proposal form to the deceased and thereafter translating the deceased's answers to PW3. There is no dispute that the deceased was illiterate and could only converse in Tamil. Based on this version, the PW4 said that the deceased was asked only four questions, namely, whether he had previously undergone any operation, whether he was diabetic, whether he had high blood pressure and whether he had cancer. PW4 testified that the deceased had answered all the questions in the negative. This version suggests that the deceased had signed the proposal form at the said meeting.

[39] I am more inclined to accept the version by PW3. Quite apart from the fact that PW3 has no pecuniary interest in the dispute, he also come across as a truthful witness. He did not prevaricate when questions were asked of him during cross-examination. His version of the events was not undermined even by learned counsel for the plaintiff during his re-examination. PW3 readily acknowledged that he had not followed the proper procedures in securing the completion of the proposal form from the deceased.

[40] Of some significance is PW3's testimony that PW4 had contacted him prior to the trial. According to PW3, he felt threatened by PW4 who had cautioned him to conduct himself "properly" when giving his testimony at the trial.

[41] On the other hand, PW4 came across as evasive and unreliable. His testimony is inconsistent and at times contradictory. He gave different versions when asked where the deceased had passed away. He initially said that he was unsure if the deceased has any siblings but later testified that he had seen the deceased's brother. He gave different answers to the question on where the deceased was staying prior to his demise. These are but a few examples that cast doubt on PW4's credibility as a witness.

[42] Accordingly, I shall consider the legal issues raised by the plaintiff based on PW3's version of the events pertaining to the completion of the proposal form.

[43] In my mind, the most important part of PW3's version of the event is that fact that PW3 had never met the deceased and that he did not witness the deceased signing the proposal form. This casts doubt on the authenticity of the deceased's signature, which if the same was not actually signed by the deceased would mean that there was never any valid insurance contract that had been entered into with the defendant. In this regard, it was also disclosed during PW4's cross-examination that PW4 was also in possession of another life policy that the deceased had with Etiqa Insurance for which PW4 had also submitted a claim. I find it unusual and strange that the deceased had chosen to insert in the proposal form PW4's home address instead of his own and to name PW4 as his nominee for the policy when the deceased has a brother. Further, there is no explanation why PW4 come to be in control of both the deceased's insurance policies and submitting claims thereunder. It seems illogical that the deceased who was merely earning RM 1,600 a month as a "part time" security guard would decide to buy two life insurance policies. Although PW4 testified that the deceased had other income as an electrician, there was no documentary evidence to substantiate the same.

[44] However, the proposal form was agreed at the start of the trial as a Part B document ie, the authenticity was not disputed. But this was because learned counsel for the defendant had not expected that PW3, who is stated

as a witness to the deceased's signature in the proposal form, would come to court giving a different account of the events relating to the execution of the proposal form.

[45] However as learned counsel for the defendant did not ask for the authentic city of the proposal form to be challenged during the trial, I do not think that it is fair for this court to treat the proposal form otherwise than an agreed Part B document.

[46] In the defendant's written submission, learned counsel for the defendant has invited this court to conclude that the deceased was in complete ignorance of the proposal form and had never authorised anyone to procure an insurance contract for him. This is a conclusion that learned counsel for the defendant submitted that I can take in the event that I disbelieve both PW3's and PW4's versions of the events.

[47] With respect, I do not think that I am in a position to hold such a view as contended by the defendant. This court cannot ignore the fact that the proposal form is an agreed Part B document. As the authenticity of the proposal form had remained unchallenged notwithstanding PW3's evidence, this court must proceed on the basis that the deceased did in fact sign the proposal form *albeit* not witnessed by PW3. This means that it is not open to this court to conclude that the deceased did not agree to the proposal form at all.

[48] However, in treating the deceased's signature on the proposal form as authentic, this court must as also treat all answers given in the proposal form as answers given by the deceased. This must be so even if the answers were in fact given to PW3 by PW4. I agree with learned counsel for the defendant that PW4 was at all material time the deceased's agent acting for and on behalf of and/or together with the deceased in that PW4 provided the information, details and answers in the proposal form for and/or on behalf of the deceased. Similarly, any or all deliberate and/or reckless misrepresentation was made by PW4 would be for and on behalf of and/or together with the deceased.

[49] The deceased is accordingly bound by the statements made, acts and or conduct of PW4 and the deliberate and or reckless misrepresentation having consented to and/or participated in the same as evidence by the deceased signing the proposal form.

[50] I agree with learned counsel for the defendant that by signing the proposal form, the deceased had confirmed and declared amongst others, that (i) the information given in the proposal form and any information he has given to the defendant is true, full and complete and he has not withheld any important information; (ii) he understands that the assurance will not begin unless and until the defendant issued the relevant policy whilst he is alive and in good health; and (iii) the defendant's agent has fully explained all the terms to him and the answers he has given are true and accurate.

[51] The deceased's proposal form was submitted on 18 September 2015. As the deceased had answered "no" to all the relevant questions in part 3, section B of the proposal form as well as in the absence of any adverse health conditions stated anywhere in the proposal form, in the usual course of business, the deceased's proposal form was approved and accepted by the defendant based on the information, details and or answers provided in the proposal form by the deceased on 25 September 2015 with a commencement date on 1 October 2015. Pursuant to the policy, the deceased was to pay a monthly premium of RM781 (or RM9,372 per annum) for 28 years commencing 1 October 2015.

[52] However, the deceased had failed to disclose the splenectomy operation, ultrasound and diagnosis in the proposal form despite having been asked the respective clear and specific questions in the proposal form. It can hardly be said that the deceased would have no knowledge of these matters.

[53] Clearly, the deceased knew that his answers to the questions in the proposal form were untrue or misleading. He did not care whether or not they were untrue or misleading and had acted in breach of his duty of *uberrimae fidei*. His answers were relevant to the defendant for its assessment of the risks and whether to accept the risks.

[54] I accept DW1's testimony that:

(i) if the deceased's aforesaid operation, ultrasound and diagnosis of infected pancreatic pseudocyst were made known to the defendant when the deceased submitted his proposal form, the policy would not have been issued then and that the deceased's application for the policy would have been postponed for further review or additional premiums and/or exclusion clause would have been imposed.

[55] DW1 explained that this is because the deceased's aforesaid operation, admission to hospital, result of the pre-operation tests, ultrasound and diagnosis would affect the defendant's insurance risk. In particular, PW1 testified that usually a splenectomy is necessary due to trauma, where the spleen has to be removed to save a life, blood cancer or infection. Of significance is the fact that after a patient had a splenectomy, his immune system is jeopardised, he is a lot easier to fall sick later on and preventive antibiotics/vaccination will have to be given.

[56] As the deceased's policy was a life insurance policy, I accept DW1's testimony that if the defendant had known of non-disclosed information and or deliberate and or reckless misrepresentation, which clearly increases the defendant's insurance risk, the defendant would either not have entered into the insurance contract and issued the policy or it would have done so on different terms.

[57] Pursuant to paras. 7(1)(b), 7(2), 7(4), 7(8) and 15 of Schedule 9 of the FSA, the defendant is entitled to avoid the policy and to refuse all claims under the policy by reason of the deceased's breach of his duty of *uberrimae fidei* and to reject the death claim.

[58] For the above reasons, I dismiss the plaintiff's claim in this action against the defendant with costs fixed at RM30,000.